STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2018 CR 000731**
vs.	:	**Judge McBride**
ADAM WAYNE TRACEY	:	**DECISION/ENTRY**
Defendant	:	

Carol A. Rowe, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Richard L. Crosby III, counsel for the defendant Adam Wayne Tracey, 250 Civic Center Drive, Suite 300, Columbus, Ohio 43215.

This cause is before the court for consideration of the defendant's amended motion filed on September 18, 2019 requesting a new trial based on newly discovered evidence,. The court heard oral argument on the motion on November 25, 2019, after which the court took the motion under advisement.

Upon consideration of the motion, the evidence presented for the court's consideration, the record of the proceedings, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On June 5, 2019, following a three day trial, a jury found the defendant Adam Wayne Tracey guilty of one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree.

The conviction arose from an incident that occurred on August 10, 2018, in Clermont County, Ohio, at the residence of the victim Ericka Newcomer. The residence is located at 825 Danny Drive.

The defendant and the victim had been in an on-again, off-again relationship. The victim had previously told the defendant that he was not allowed to be at her residence.

On August 10th, the defendant kicked in a basement door which led to the kitchen. When inside the residence, the defendant rummaged through the cabinets. A resident of the home, Leah Newcomer, saw the defendant doing this and called police. Officers from the Union Township Police Department arrived and discovered the defendant hiding in the basement. The police searched a bag the defendant had which contained several items from the residence, including a BB gun, a baby monitor, and an electrical cord.

On December 20, 2018, the defendant filed his response to the state's motion for discovery which disclosed, *inter alia*, the intention to call Jaclyn Schultz as a witness. The case was tried to a jury from June 3rd through June 5th of 2019. The jury returned a verdict of guilty. On June 20th, the defendant filed a *pro se* motion for a new trial, which was not accompanied by any supporting evidence.

On July 1, 2019, the court held a sentencing hearing. It was at this hearing that the court first became aware of the defendant's motion. Defense counsel stated that

there was no reason why a sentence should not be imposed. The defendant, when questioned about whether he was asking for a continuance of the sentencing hearing, replied that he was not asking for a continuance. The sentencing hearing then proceeded without objection from either side. The court sentenced the defendant to a prison term of five years, and an entry journalizing the sentence was filed on July 23rd.

On September 18, 2019, the defendant, represented by counsel, filed an amended motion for a new trial based on newly discovered evidence. The motion alleges that the defendant has a new witness who was unavailable at trial, Jaclyn Schultz, who would provide exculpatory testimony. Schultz provided an affidavit alleging that she saw the defendant in possession of two of the stolen items, the baby monitor and the BB gun, before the burglary occurred on August 9, 2018.[1] She also avers that she never had conversations with counsel Ron Mason or Bruce Wallace regarding her testimony because she was hospitalized prior to and during the trial.[2]

The motion for new trial also purports to include affidavits from the defendant's trial counsel, but no such affidavits were filed.

The state filed a response in opposition on October 4, 2019. Among its multiple arguments, the state posits that Schultz's testimony is not new evidence as she was available to testify at the trial. In support, the state submitted multiple recorded conversations from the jail between the defendant and Schultz. In a June 12, 2019 phone call, which would have been eight days following the trial's conclusion, Schultz states that she was in rehab at the ARC,[3] but was released "literally like two weeks ago."[4] She also

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[1] Schultz Aff., ¶¶ 5 and 8.
[2] Schultz Aff., ¶ 9.
[3] Adams Recovery Center.
[4] State's Ex. B.

states that she called the defendant's attorney: "I called your freaking lawyer like 80 fucking times. I did. I left like 80 fucking messages. I told that mother fucker call me. I will be there."

A few days later, on June 16, 2019, Schultz and the defendant had another recorded conversation during which the following exchange occurred:

> SCHULTZ: I hate your attorney. Do you know that I called that mother fucker 80 times? I'm not even kidding you—80 times!
>
> DEFENDANT: He called me. He told me he said he talked to you twice, or two or three times or something.
>
> SCHULTZ: Finally. Because it took him a month to call me back.
>
> * * *
>
> SCHULTZ: God I'm sorry I went away, man. I could have helped you a lot fucking more. But that mother fucker [defense counsel], as soon as I seen that you were trying to get ahold of me, I did try. And he didn't call me back for literally, like 25 days. He did not call me back. And I left massive amounts of very like, just a lot of messages.
>
> * * *
>
> SCHULTZ: I left him [defense counsel] very detailed messages every time. I said he's innocent. I said he was with me. He didn't do none of this shit. Call me back. Every day I called that mother fucker for a month. Because I got the number, what was it, May 1st, and I called him every day since then, and he and he just called me back on June 1st!?
>
> * * *
>
> SCHULTZ: And I wanted to be on the stand. I even told him [defense counsel] that. And he wouldn't fucking—he never called me back before any of that.[5]

[5] State's Ex. C.

The defendant and Schultz had an additional conversation on June 23, 2019, which is as follows:

> DEFENDANT: Erica dropped me off at Meijer, and I begged, and I was trying to find someone to come get me, and you came and get me at UDF, remember that?
>
> SCHULTZ: Yeah.
>
> DEFENDANT: The cop searched my laptop bag—do you remember what was in my? Don't say nothin'.
>
> SCHULTZ: No, no.
>
> DEFENDANT: Don't say nothin'. Never mind. Never mind. Do you remember what was in this thing and stuff?
>
> SCHULTZ: Mmm hmm.
>
> DEFENDANT: Do you remember that?
>
> SCHULTZ: Yes, yes.
>
> DEFENDANT: Do you remember anything else? Just, like, tell me if you remember.
>
> SCHULTZ: Ugh. Not really. Kind of tell me if you can. No.
>
> DEFENDANT: It's like cords and there was like a half of a baby monitor.
>
> SCHULTZ: Oh, okay.
>
> DEFENDANT: Do you remember that?
>
> SCHULTZ: Yes, wait a minute. That was yours?
>
> DEFENDANT: That was stuff that was already in the house.
>
> SCHULTZ: Oh! Okay. Yes, yes, yes.[6]

[6] State's Ex. D.

The defendant did not file a reply in support of his motion. On November 25, 2019, the court heard oral argument on the motion, after which is took the motion under advisement.

LEGAL ANALYSIS

A defendant may be granted a new trial when new evidence material to the defense is discovered that the defendant could not with reasonable diligence have discovered and produced at the trial.[7] Specifically, Crim.R. 33(A) provides, in pertinent part, as follows:

> "(A) **Grounds**. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."[8]

To prevail on a motion based on new evidence, the defendant must establish that the evidence:

> "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial,

[7] *State v. Brown*, 12th Dist. Preble No. CA2019-04-006, 2020-Ohio-971, ¶ 42, citing Crim.R. 33(A)(6).

[8] (Emphasis added.) Crim.R. 33(A).

> (3) is such as could not in the exercise of due diligence have been discovered before trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict former evidence."[9]

Trial courts subject motions for a new trial based on newly discovered evidence to "the closest scrutiny."[10] Notably, motions for a new trial are not granted lightly.[11] "The decision as to whether or not to grant a new trial on the grounds of newly discovered evidence rests within the trial court's discretion * * *."[12]

As Crim.R. 33(A)(6) explains, when a motion for a new trial is based on newly-discovered evidence, the defendant must produce affidavits of the witnesses from whom such evidence is expected to be provided that inform the trial court of the substance of the evidence that would be presented if a new trial were to be granted.[13] "Moreover, it is well-established that a trial court may weigh the credibility of the affidavits submitted in support of a motion for a new trial to determine whether to accept the statements in the affidavit as true."[14]

In turning to the present case, under Crim.R. 33(A)(6), a new trial is not warranted because (1) the new evidence has not been discovered *since* the trial and, (2) in the

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[9] *State v. Zielinski*, 12th Dist. Warren No. CA2014-05-069, 2014-Ohio-5318, ¶ 15, citing *State v. Petro*, 148 Ohio St. 505 (1947), syllabus. *See State v. Carr*, 12th Dist. No. CA2004-01-006, 2005-Ohio-417, ¶ 6, citing *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993).
[10] *State v. Hatton*, 4th Dist. Pickaway No. 13CA26, 2014-Ohio-3601, ¶ 10.
[11] *State v. Buell*, 12th Dist. Warren No. CA2017-07-102, 2018-Ohio-1350, ¶ 9, citing *State v. Hoop*, 12th Dist. Brown No. CA2012–10–019, 2013–Ohio–3078. See *State v. Zielinski*, 12th Dist. Warren No. CA2014-05-069, 2014-Ohio-5318, ¶ 16, quoting *State v. Thornton*, 12th Dist. Clermont No. CA2008-10-092, 2009-Ohio-3685, ¶ 21 (noting same).
[12] *Brown*, 2020-Ohio-971 at ¶ 43, citing *Thornton*, 2013-Ohio-2394 at ¶ 61. *See State v. Shaner*, 12th Dist. Preble No. CA2018-09-013, 2019-Ohio-2867, ¶ 28, citing *State v. Brakeall*, 12th Dist. Fayette Nos. CA2008-06-022 and CA2008-06-023, 2009-Ohio-3542, ¶ 9. ("The decision to grant or deny a motion for a new trial pursuant to Crim.R. 33 is within the discretion of the trial court.").
[13] *Brown*, 2020-Ohio-971 at ¶ 42, citing *State v. Holmes*, 9th Dist. Lorain No. 05CA008711, 2006-Ohio-1310, ¶ 13.
[14] *State v. Knecht*, 12th Dist. Warren No. CA2015-04-037, 2015-Ohio-4316, ¶ 35, citing *State v. Rodriguez*, 12th Dist. Butler No. CA2008–07–162, 2009–Ohio–4460, ¶ 76.

exercise of due diligence it could have been discovered before trial. The defendant has argued that Schultz's testimony is new because she was unavailable to testify at trial. In support, the defendant cites to a decision from the First District Court of Appeals, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912 (1st Dist.), which states:

> "'Whether evidence was unavailable to an accused at trial is, to some extent, to be determined by whether the source of the evidence was available for examination or cross-examination by an accused [sic] counsel at trial.' *State v. Wright* (1990), 67 Ohio App.3d 827, 832, 588 N.E.2d 930. It makes little difference if a defendant knows about the testimony of a witness who exercises his or her right not to testify because the defendant cannot present that testimony. Additionally, the evidence is newly discovered because the witness's decision to waive his or her rights was not known before or during trial despite due diligence. The defendant did not know that the witness would ultimately testify in his favor. *See United States v. Gates* (C.A.11, 1993), 10 F.3d 765, 767."[15]

In *Condon*, the First District Court of Appeals held that evidence from a codefendant who was unavailable at trial because the codefendant had invoked his privilege against self-incrimination constituted newly discovered evidence. In reaching its decision, the court relied upon the minority view in the federal court system and its interpretation of the corresponding federal rule, Fed.R.Crim.P. 33.[16]

The First District Court of Appeals, however, overruled its holding in *Condon* to the extent that it held that "newly available" evidence is synonymous with "newly discovered" evidence in *State v. McGlothin*, 1st Dist. Hamilton No. C–060145, 2007–Ohio–4707. Relying upon the majority view of the federal courts, the First District Court of Appeals in

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[15] *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912, ¶ 19 (1st Dist.).
[16] Id. at ¶ 18.

McGlothin determined that the clear language of the rule dictates that "newly available" evidence cannot be equated with "newly discovered" evidence:

> "'[N]ewly available evidence' is not synonymous with 'newly discovered evidence.' *United States v. Jasin*, 280 F.3d 355, 368 (3d Cir.2002). To consider the testimony of a codefendant after he has been sentenced as newly discovered evidence 'would encourage perjury to allow a new trial once codefendants have determined that testifying is no longer harmful to themselves.' *United States v. Reyes–Alvarado*, 963 F.2d 1184, 1188 (9th Cir.1992). We agree with the reasoning of the Third Circuit that the majority view 'establish[es] a straightforward bright-line rule, [and] is anchored in the plain meaning of the text.' *Jasin* at 368. Accordingly, we adopt the majority view. To the extent that *State v. Condon* held otherwise, we overrule it."[17]

The court of appeals therefore held that the trial court did not err when it refused to grant the defendant's motion for a new trial, finding that the evidence offered in the codefendant's affidavit after the trial ended was not newly discovered where defense counsel knew about the substance of the codefendant's testimony.[18] Indeed, Ohio courts since *Condon* have not equated "newly discovered" with "newly available."[19]

In any case, the state's evidence belies the defendant's contention that Schultz was unavailable or unwilling to testify for the defense at trial. Although Schultz averred that she was hospitalized at the time of the trial, her recorded conversations with the defendant reveal that she was released from her rehabilitation program approximately five days prior to the start of trial.

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[17] *State v. McGlothin*, 1st Dist. Hamilton No. C–060145, 2007–Ohio–4707, ¶ 41.
[18] Id. at ¶ 42.
[19] *See State v. Howard*, 8th Dist. Cuyahoga No. 101359, 2015-Ohio-2854, ¶ 53 ("In light of the above, we find that although Smith's testimony was undoubtedly 'newly available' following her conviction, the evidence offered in her affidavit was not 'newly discovered.'").

Further, defense counsel was aware of Schultz's value as a witness because it listed her in discovery disclosures to the state as a witness and spoke with her before trial. Likewise, the defendant was aware of Schultz's value as a wjtness because, as can be heard from their recorded conversation, the defendant reminded Schultz that she had seen what he had in his laptop bag, specifically telling her of the cords and a baby monitor. This would have been information the defendant knew of prior to trial as well. In other words, it was not as though Schultz was an unknown witness to material facts of the case.

Indeed, the defendant stated at numerous points during his recorded conversations with Schultz that he had urged his attorney to have her testify. And Schultz stated in her recorded conversations that she called defense counsel approximately 80 times, left him detailed voicemail messages, spoke to him, and indicated her willingness to testify at trial. Thus, the court concludes that the evidence demonstrates that Schultz's potential testimony was known before trial. Moreover, the evidence indicates that Schultz was not unavailable or unwilling to testify for the defense. As such, the defendant has not satisfied the requirements of Crim.R. 33(A)(6) for a new trial.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion is not well-taken and hereby denies it.

IT IS SO ORDERED.

DATED: 4.20.20

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been sent on this 20th day of April 2020 by e-mail to Carole Rowe, Assistant Prosecuting Attorney, at crowe@clermontcountyohio.gov, and to Richard Crosby III, Attorney for the Defendant, at rlcrosby@bmdllc.com. A printed copy was provided to the Prosecuting Attorney's Office, and a printed copy was mailed by regular U.S. Mail to Richard Crosby III, 250 Civic Center Drive, Suite 300, Columbus, Ohio 43215.

Judicial Assistant to Judge McBride